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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—vs.—

OPERA ON TOUR, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK and BRIEF IN SUPPORT THEREOF

WILLIAM MACY,
Attorney for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—*vs.*—

OPERA ON TOUR, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph N. Weber, as President of the American Federation of Musicians, and George E. Browne, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada, respectfully shows unto this Honorable Court:

Summary Statement of Matter Involved.

1. This case does not concern private or individual rights, but is of far greater significance, as the opening sentence of the prevailing opinion in the New York Court of Appeals says (285 N. Y. 348, 352):

> "The question presented for decision is far reaching and of vital importance to the best interests of unions, of employees, of employers and of the general public."

2. Petitioners are the musicians' union with a membership of about 128,000 (R. 551), and the stage hands' union with a membership of between 50,000 and 60,000 (R. 490), both bona fide labor organizations affiliated with the American Federation of Labor. The members of both organizations are united in interest, being engaged in the same trade or industry—the amusement industry—working in the same places and for the same employers (R. 769).

3. Respondent was organized as a New York corporation in January, 1938 to engage in the general amusement business (R. 806), but confined its activities to the stage presentation of the opera "Faust", travelling from city to city outside of New York State, using live singers, but using a new and novel scheme of recorded or mechanized music from records made in England, in substitution for and in competition with live orchestras, thus creating the danger of further serious inroads on the already greatly depleted employment opportunities of musicians (R. 570, 595, 603, 604), theirs being the only industry in which their own product was being used to "destroy ourselves" (R. 564).

4. At the request of the musicians' union in its combat against this further encroachment on the employment and livelihood of its members, the stage hands' union withdrew its members from respondent's service.

5. The New York Supreme Court thereupon issued a permanent injunction (R. 27), which, in violation of the XIVth Amendment to the U. S. Constitution, in most sweeping terms not alone prohibits a strike by the members of both labor organizations at the instance of either one of

them, but in effect prohibits any picketing, or causing, procuring or advising anyone—even musicians whom respondent says it does not employ or need—(R. 6, 15), by any device or in any manner whatsoever, to leave respondent's employ or not to enter its employ, on the ground or for the reason that respondent uses mechanized music.

The Appellate Division of the New York Supreme Court, by a divided court of 3 to 2, reversed this judgment and dismissed the complaint. The New York Court of Appeals, by a divided court of 4 to 2, reversed the Appellate Division and affirmed the Special Term judgment.

The effect of this judgment is to permanently enjoin both unions, their members and representatives from in any manner or by any device whatsoever, inducing, causing or procuring any person or persons not to work for respondent —irrespective of whether that is brought about by mere request, peaceful persuasion and without force or intimidation of any kind whatsoever. In effect, it prohibits strikes, peaceful picketing, freedom of speech and assembly, and denies to petitioners equal protection of the laws contrary to the XIVth Amendment to the United States Constitution. Respondent may use mechanized music to dispense with musicians' services, but musicians may not protect their employment or livelihood by peacefully opposing the use of mechanized music.

6. As Chief Judge Lehman in his dissenting opinion in the Court of Appeals says (285 N. Y. 363, 365):

> "There is no substantial controversy about the facts * * * The evidence establishes beyond possible contradiction, and the Appellate Division has found, that 'the actions of the defendants were all in good faith, without malice or ill-will, with primary or direct intent to injure or destroy plaintiff's business, without fraud, force, coercion, or intimidation of any kind, in the honest

belief that such actions were necessary for the protection of the employment opportunities of their members, in furtherance of their economic interest in the continued employment of those in allied trades, and there was no effort on the part of the plaintiff to dispute the good faith of the defendants'."

Respondent's officers so testified (R. 89, 140, 423, 424, 432), and the Trial Court so stated (R. 462, 721).

Statement as to Jurisdiction.

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344 (b) (Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925).

The decision of the New York Court of Appeals, by a division of 4 to 2, was rendered April 24, 1941. Pursuant to the New York practice and procedure, this was made the judgment of the Supreme Court, New York County, by order dated June 9th, 1941, and judgment thereon was entered in the Supreme Court, New York County on June 10th, 1941. Application for a rehearing, timely filed, was denied by the Court of Appeals on June 5th, 1941. The Court of Appeals is the highest Court in New York State in which a decision could be had.

Petitioners persistently throughout the trial and on appeal urged and insisted:

1. Upon the right to strike—refusal to work—and to freely and peacefully solicit, persuade and request others to similarly help them in protective measures against the use of mechanized music (R. 65, 115).

2. That the case involved a labor dispute under Section 876-a of the New York Civil Practice Act, prohibiting the injunction here issued;

3. That the case presented merely an economic problem which was for the Legislature and not for the Courts.

These questions were extensively argued throughout the trial as well as on petitioners' motion to dismiss the complaint at the commencement of the trial (R. 67) and at the close of plaintiff's case (R. 546). Respondent's counsel answered by saying (R. 122), that petitioners' acts were not protected either by

"the common law nor the 14th amendment."

There was thus specifically drawn in question, in the case at bar, the constitutional guarantee of free speech.

Respondent again, at page 11 of its brief before the Appellate Division, similarly urged, quoting from *Dorchy* v. *Kansas*, 272 U. S. 306, that the XIVth Amendment did not apply, that the right to carry on a business—be it called a liberty or property—has value and that to interfere with this right without just cause is unlawful. Following up its argument that the XIVth Amendment afforded petitioners no protection for their action, respondent, at page 35 of its brief in the Appellate Division, and at page 3 of its brief in the Court of Appeals, reiterated its position that petitioners' actions were so far outside the allowable area of economic conflict, that the blanket injunction in this case, no matter how sweeping in its terms, was proper.

Petitioners, at page 30 of their brief in the Appellate Division, cited *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, quoting this court's language, which sustains the right to

> "advertise and disseminate facts and information with respect to terms and conditions of employment and peacefully to persuade others to concur in their views respecting an employer's practices."

Petitioners, at pages 63 and 64 of their same brief, made the specific point that this injunction practically prevents free discussion and the dissemination of facts.

Petitioners, in their brief to the Court of Appeals, discussed the sweeping character of this injunction, and cited:

At page 21, *Senn* v. *Tile Layers' Union*, 301 U. S. 468, 482; and at page 35 of the same brief, *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, quoting from the *Thornhill* case, at page 102:

> "In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is granted by the Constitution."

The court at Special Term (R. 1222) held that there was no labor dispute, merely an economic question as to whether in the march of time, plaintiff may lawfully use canned music as a medium of conducting operas instead of employing live musicians, and therefore, held defendants' acts to be illegal.

The Court of Appeals in the prevailing opinion (285 N. Y. 348) concludes, at page 357:

> "For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity for employment is not a lawful labor objective."

The opinion, however, at page 353, reiterated the right to strike, and that:

> "Individually and collectively, the members of any union may at any time refuse to work, because machinery is employed or for any other reason, and may strike in so doing. The members of these unions are free to refuse to work if they object to working in the presence of a machine."

The Court of Appeals thus necessarily passed upon the Federal question—the right to strike, the right of freedom of speech by persuasion, solicitation and request, refusing that right to petitioners because of the claimed illegality of their labor objective.

This is further shown by that court's decision in *Wohl* v. *Bakery & Pastry Drivers' Union*, 284 N. Y. 788, decided December 31, 1940, after the case at bar was argued and while it still was awaiting decision by that court. The prevailing opinion of the Court of Appeals in this case, at page 357, refers to the *Wohl* case, as follows:

> "So, too, in a case just unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week."

This court's later reversal in the *Wohl* case, on June 2nd, 1941, No. 91, October Term 1940, on the authority of *American Federation of Labor* v. *Swing*, 312 U. S. 321, sustains the petitioners' position on the Federal questions presented by them.

Chief Judge Lehman, in his vigorous dissent in the case at bar, 285 N. Y. page 360, says that this

"Is an injunction against a strike and nothing else."

and finds that the economic dispute involved is a labor dispute for Legislative enactment and not for the courts, and that this injunction is a constitutional violation. He says at page 369:

> "In my opinion, the assertion of authority by the court in this case to enjoin the defendant union from calling a strike of their members does not accord with judicial decision and Legislative decree which this court has said is valid under the Constitution."

And at page 366:

> "...in my opinion, the injunction issued by the court at Special Term constitutes an intrusion by the court into a field from which it is excluded under the laws of the State as formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution."

The Court of Appeals thus decided that it was not a legal labor objective for a labor union to protect its members' employment opportunities by combating the use of labor curtailing devices or equipment. Therefore, the Court of Appeals reinstated a permanent injunction which not alone prohibits a strike in good faith, without malice, force or violence, but also in effect prohibits picketing, freedom of speech and free assembly guaranteed by the XIVth amendment.

Questions Presented.

The following Federal questions, of immense importance not alone to labor but to the general public, are presented by this record:

1. Does the injunction restraining unions from striking—refusing to work—in protest against the introduction of mechanical devices which displace labor, violate the constitutional guarantee of freedom of speech and assembly, and equal protection of the laws?

2. Does the injunction by its unlimited scope infringe the constitutional guarantee of free speech and assembly?

These questions are not complicated by any local question which would independently sustain the injunction. The only other question raised at the trial by petitioners, was the application of §876-a, New York Civil Practice Act. The Court at Special Term, and the Court of Appeals, held that section inapplicable, and it did not enter into the result reached by the Court of Appeals.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the New York Court of Appeals is in direct conflict with the following decisions of this court:

American Federation of Labor v. *Swing*, 312 U. S. 321;
Bakery & Pastry Drivers v. *Wohl*, No. 901, October Term, 1940, decided June 2, 1941;
Carlson v. *California*, 310 U. S. 106;
Hague v. *C. I. O.*, 307 U. S. 496, 519;
Milk Wagon Drivers' Union v. *Meadow Moor, Dairies, Inc.*, 312 U. S. 287;
Near v. *Minnesota*, 283 U. S. 697, 716;
Senn v. *Tile Layers' Union*, 301 U. S. 468, 478;
Thornhill v. *Alabama*, 310 U. S. 88;
Truax v. *Corrigan*, 257 U. S. 317, 327;

U. S. v. *Brotherhood of Carpenters etc.*, 312 U. S. (Decided April 8, 1941);
U. S. v. *International Hod Carriers' etc.*, 312 U. S. (Decided April 7, 1941);
U. S. v. *Hutcheson*, 312 U. S. 219.

The decision of the New York Court of Appeals which is sought to be reviewed, is of historic importance.

That Court had made its decision in *Wohl* v. *Bakery & Pastry Drivers* on the ground (as explained in its reference to the *Wohl* case in the case at bar) that the conceded right to strike was nevertheless limited by the "legality" of the object of the strike; that the Court had the right to circumscribe, in accordance with its own notions of economics, the precise area in which labor disputes are "legal".

Having taken that position, it claimed the right to prevent, by injunction, any effort of labor unions to publicize their grievances or by peaceful suasion to win both labor and the public to their point of view. In so doing, the New York Court of Appeals deprived the unions of their Constitutional guarantee of freedom of speech and of assembly, and ran counter to this Court's line of decisions culminating in the *Swing* case, where this Court said (p. 326):

> "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case";

and again (at p. 326):

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state".

It was on the basis of the *Swing* case that this Court reversed the *Wohl* case, but the Court of Appeals decided the case at bar before the *Wohl* case was reversed, and based its holding in the case at bar largely upon its decision in the *Wohl* case.

2. The attempt of the New York Court of Appeals in this case, as well as in *Bakery & Pastry Drivers'* v. *Wohl*, to outlaw strikes inimical to that court's ideas of economics, under the guise of calling such strikes "unlawful," is an effort to outlaw strikes through judicial censorship, and is an insidious method of stifling freedom of speech and assembly. This is a matter of National rather than State importance. It is the only question presented by this record, and the only question passed upon by the New York Court of Appeals in sustaining the injunction.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue out of, and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that court to certify and send to this court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case entitled: "SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK: OPERA ON TOUR, INC., Plaintiff—against—JOSEPH N. WEBER, as President of American Federation of Musicians, and

GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Defendants," and that the order and judgment of the said Court of Appeals may be reversed and that your petitioners may have such other and further relief as may be proper.

Dated: New York, July 21st, 1941.

JOSEPH N. WEBER,
Individually and as President of American Federation of Musicians.

GEORGE E. BROWNE, individually and as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada.

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